FILE COPY

No. 235

Supreme Court of the United States

(October Term, 1943)

Great Northern Life Insurance Company,
Petitioner,

versus

Jess G. Read, Insurance Commissioner
for the State of Oklahoma,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE

John H. Miley,
Russell V. Johnson,
1039 First National Building,
Oklahoma City, Oklahoma,
Amici Curiae.

January, 1944.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER FOR THE STATE OF OKLAHOMA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COME NOW John H. Miley and Russell V. Johnson, and move this Honorable Court for leave to file in this cause the attached brief as *amici curiae*. In support of said motion movants allege:

1. This cause challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the 1941—4% insurance premium tax law of the State of Oklahoma.

2. Great public interests are involved and many persons will be affected by the precedent to be established herein.

3. The cause of *Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, v. Jess G. Read, Insurance Commissioner for the State of Oklahoma, and A. S. J. Shaw, State Treasurer for the State of Oklahoma, Defendants in Error*, No. 31338, is pending in the Supreme Court of the State of Oklahoma, wherein the issues as to the validity of such tax are identical with the issues in this cause; that said cause pending in the Supreme Court of the State of Oklahoma, whether decided before or after the decision in this cause, will be affected by the decision of this cause.

4. The judgment of the District Court of the State of Oklahoma in and for Oklahoma County, from which the appeal was taken in said cause pending in the Supreme Court of the State of Oklahoma, was introduced in the record of this cause by the respondent herein and constitutes a part of the record herein (R. 35).

5. Movants are of counsel of record for plaintiff in error and interested in said cause pending in the Supreme Court of the State of Oklahoma.

6. Movants have secured written consent of counsel for the petitioner herein, to the appearance and filing of a brief herein by movants as *amici curiae*, but the respondent declines to give his consent.

JOHN H. MILEY,
RUSSELL V. JOHNSON,
1039 First National Building,
Oklahoma City 2, Oklahoma,
Movants.

Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER FOR THE STATE OF OKLAHOMA,
Respondent.

BRIEF AMICI CURIAE

STATEMENT

Amici curiae are of counsel of record in cause No. 31338, styled "*The Lincoln National Life Insurance Company, a corporation*, Plaintiff in Error, v. *Jess G. Read, the Insurance Commissioner of the State of Oklahoma;* and *A. S. J. Shaw, State Treasurer of the State of Oklahoma*, Defendants in Error," pending in the Supreme Court of Oklahoma, wherein they contend that the 4% insurance premium tax law of Oklahoma denies to foreign insurance companies the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. Said cause is an appeal from the judgment of the District Court of the State of Oklahoma in and for

Oklahoma County, which judgment was introduced in the record of this cause (R. 35-38). The issues in said cause pending in the Supreme Court of Oklahoma and in this cause as to the legal effect of the 4% insurance premium tax law of Oklahoma in the light of the equal protection clause of the Federal Constitution are identical. Therefore this brief will be limited to that question.

This cause originated in the United States District Court for the Western District of Oklahoma upon the complaint of the petitioner (R. 3). From an adverse judgment in said court the petitioner perfected an appeal to the Circuit Court of Appeals for the Tenth Circuit, where the judgment of the lower court was affirmed (R. 39-47; 136 Fed. [2d] 44). The petition herein for a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit was granted by this Court by order filed October 11th, 1943 (R. 48).

The record herein reveals the following facts about which no controversy exists:

The petitioner is a corporation organized under the laws of Wisconsin. It is authorized to issue policies of life, health and disability insurance. In December, 1922 and each year thereafter to 1942, inclusive, the Insurance Commissioner of Oklahoma issued to it a license to do business in the State of Oklahoma. Each of such license certificates by its terms expired on the last day of February next after its issue. (See opinion of Circuit Court of Appeals, R. 39; complaint, R. 3-4; answer, R. 11-12; exhibit "B" to stipulation of facts, R. 23.) It has annually paid

to respondent the fee required by law (denominated license or entrance fee) in the sum of $300.00 (R. 4, 12). During the period that petitioner has done business in Oklahoma it has built up a large and profitable business which cannot be leased or sold to other persons (R. 4, 12).

Section 2, Article XIX, of the Constitution of Oklahoma (*infra*) requires that, until otherwise provided by law, each foreign insurance company doing business in the state pay an annual entrance fee in a prescribed amount ($25.00 to $200.00, according to classification) and an annual tax of 2% on all premiums collected in the state, less specified deductions, and a tax of $3.00 on each local agent.

Chapter 21, Article 1, Section 22, of the General Insurance Act of 1909, Section 10478, Okla. Stat. 1931 (Appendix I), requires that every foreign insurance company doing business in Oklahoma shall, annually, on or before the last day of February, report to the Insurance Commissioner the total amount of gross premiums received in the State of Oklahoma during the preceding calendar year, and at the same time pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Oklahoma Constitution and an annual tax of 2% on all premiums collected in the State, less specified deductions, and an annual tax of $3.00 on each local agent.

Section 10478, Okla. Stat. 1931, *supra*, was amended by the Session Laws of Oklahoma, 1941, page 121 (36 Okla. Stat. 1941, sec. 104), which amendment became effective April 25, 1941 (Appendix II). The amendment

increased the *rate* of the tax imposed by the former statute from to 2% to 4%. The provisions of the former statute were not otherwise changed in any material respect.

The opinion of the Circuit Court of Appeals determined that no gross premium tax is exacted from domestic insurance companies in Oklahoma (R. 41). Such determination conforms with the laws of Oklahoma and the admissions of the parties herein (R. 5, 13).

The statutes of Oklahoma prescribing the conditions precedent to admission of foreign insurance companies into Oklahoma and regulations governing such companies are included in Appendix I hereto attached. Consideration of such statutes is necessary in determining the question before the Court, and special attention will hereinafter be devoted thereto.

It is admitted by the stipulation of facts (R. 20-23) and the trial court found (R. 23-27) that domestic companies competing in Oklahoma with petitioner do not pay any kind or type of taxes which are not likewise paid by petitioner, except that said competing domestic insurance companies pay an annual income tax, from which tax petitioner is exempt, the amount of which tax, however, is approximately only one-twentieth of the amount a 4% tax would bring on the premiums collected by said companies in Oklahoma, less proper deductions; that the expenses of the Oklahoma Insurance Department since November, 16, 1907 (statehood), have been approximately 3.55% of its total receipts from the 2% insurance premium tax and the annual entrance and agents' fees collected from

foreign insurance companies; that since December 31, 1941 (the 4% insurance premium tax became effective April 25, 1941), said expenses are approximately 2% of the gross receipts thereof.

The decision of the Circuit Court of Appeals conforming to the stipulation of the parties reveals: Since 1909, it has been the uniform administrative practice of the Insurance Commissioner in Oklahoma that when a foreign insurance company desires for the first time to do business in Oklahoma, it is required to apply for a license, to expire on the last day of February next after its issue, and on or before the date of the expiration of its first license to pay the tax under the law in question on business done from the date of issuance of its first license to the end of the calendar year in which the license was issued; and when said company desires to renew its first license or any subsequent annual license, it is required (a) to apply on or before the expiration of its current license, for a renewal license covering the ensuing license year, and (b) to pay said tax that is due for the current license year, as a condition precedent to the issuance of the renewal license, and (c) to pay on or before the expiration of the renewal license the tax under the law in question on business done during the preceding calendar year; that since 1909, the Insurance Commissioner of Oklahoma has uniformly interpreted the tax law in question as requiring a license to expire on the last day of February next after its issue, and in issuing renewal licenses as requiring the payment on or before the expiration of the renewal license of the tax under the law in question for the privilege en-

joyed before the expiration of the renewal license (R. 40-41; 20-22).

It is admitted (R. 5, 12) that on February 28, 1942, petitioner paid under protest the 4% insurance premium tax required by 36 Okla. Stat. 1941, sec. 104, *supra*. Petitioner brought this action to recover such tax and alleged that the laws of Oklahoma under which such tax was levied and collected are invalid and in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States R. 4-6). From an adverse judgment the petitioner appealed to the Circuit Court of Appeals, where the judgment was affirmed (R. 39).

ERRORS HERE URGED ARE

1. Section 1, Chapter 1-a, Title 36, Session Laws of Oklahoma 1941 (Sec. 104, Tit. 36, Okla. Stat. 1941), is unconstitutional in that it denies to petitioner the equal protection of the laws and takes its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

2. The levy and collection of the tax by the respondent, purporting to act pursuant to said statute, is unconstitutional upon the same grounds.

3. The judgment and the opinion of the United States Circuit Court of Appeals, Tenth Circuit, are in error in holding the statute valid and the tax here for review valid, notwithstanding the provisions of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

I.

The rules and principles announced by the United States Supreme Court in the Hanover case reveal that the tax law of Oklahoma here in question denies to foreign corporations in Oklahoma the equal protection of the laws.

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494, 71 L. ed. 372.

(A) ***This Court will accept the character of the tax as determinated by the State Court, but will exercise its independent judgment in determining whether the tax with the meaning given violated the Federal Constitution.***

Hanover Fire Insurance Co. v. *Harding, supra*:

a. The net receipts tax law of Illinois had been characterized by the latest expression of the Illinois courts as a privilege tax.

b. This Court although bound by the construction that the state court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect.

c. The validity of the tax, whatever its character may be, depends upon its operation and effect as applied and enforced.

(B) ***The question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations.***

Hanover Fire Insurance Co. v. Harding, supra:

a. After its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.

(C) ***A foreign insurance company is admitted into the State and put on a level with domestic insurance companies by compliance with valid CONDITIONS PRECEDENT.***

Hanover Fire Insurance Co. v. Harding, supra:

a. Conditions precedent are those requirements that are capable of being fulfilled before admission, such as payment of license fee, showing prescribed amount of capital, appointment of service agent, and filing of reports, financial statement and charter.

b. A privilege tax may be made to apply either as a condition precedent to admission (license fee) or as a tax after admission.

c. The 1919 gross premium tax law of Illinois was a privilege tax and required the payment of a sum certain, before the license was issued for the privilege to be exercised following admission and was a condition precedent. (See appendix III and analysis in argument).

d. The net receipts tax law of Illinois was a privilege tax based on the benefits derived from business done and was paid after the privilege was exercised and could not be a condition precedent.

(D) ***Tax laws that apply to foreign corporations after they are admitted into the State must conform to the equal protection clause of the Fourteenth Amendment.***

Hanover Fire Insurance Co. v. *Harding, supra:*

a. A law that applies a tax after admission is to be considered a law for the purpose of raising revenue and must conform to the equal protection clause.

(E) ***A foreign corporation licensed for one year at a time cannot be required to show past compliance with a tax law that violates the Federal Constitution, under the guise that the payment of the tax is a condition precedent to the renewal of its annual license.***

Marion L. Frost, et al. v. *Railroad Commission of the State of California*, 271 U. S. 583.

Hanover Fire Insurance Co. v. *Harding, supra:*

a. The foreign insurance company in the Hanover case was licensed for one year at a time, but the court held that whether the license is indefinite or for one year at a time, the principle is the same that, pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens.

b. A foreign corporation cannot be required to agree to submit to invalid tax laws as a condition to the issuance of original or renewal licenses.

c. The state cannot relieve itself from granting the equal protection of the laws to a foreign corporation by requiring such corporations to pay an invalid tax as a condition precedent to the renewal of an annual license.

II

The gross premium tax law of Oklahoma applies after issuance of each annual license. Since it is exacted for the privilege already exercised, its payment cannot be required as a valid condition precedent to the annual license renewal.

(A) ***Provisions of Constitution and Statutes of Oklahoma affecting determination of issue herein.***

a. The constitution and statutes of Oklahoma require the payment of a license fee in a prescribed amount and applies the gross premium tax after the license is issued. (See analysis in argument.)

b. Gross premium tax laws such as the law of Oklahoma impose taxes, payable at the end of the license period for the privilege previously exercised for it cannot be presumed that the legislature intended to exempt a foreign insurance company from taxation upon its first year's business. It is primarily a license tax and is unlawfully enforced as a condition precedent in the event of a renewal of the license.

Pacific Mutual Life Insurance Co. v. *Hobbs* (Kan.), 103 Pac. (2d) 854.

c. The general insurance act of 1909 prescribes the conditions precedent to admission of foreign insurance companies into Oklahoma, and foreign insurance companies are admitted under the provisions thereof before the gross premium tax law can apply. (See Appendix I, II and Analysis in Argument.)

(B) ***Oklahoma decision construing the Oklahoma gross premium tax law.***

a. The gross premium tax law of Oklahoma imposes a privilege tax which is subject to no limitation except that it shall not conflict with the Federal Constitution.

New York Life Insurance Co. v. *Board of County Commissioners,* 155 Okla. 247, 9 Pac. (2d) 936.

(C) ***Illustration of uniform administrative practice and construction in Oklahoma according to findings of Circuit Court of Appeals.***

(See illustration in Argument.)

(D) ***Illustration of operation of the 1919 Illinois gross premium tax law involved in the Hanover case.***

(See illustration in Argument.)

a. The illustration of the operation of the 1919 insurance premium tax law of Illinois involved in the Hanover case and the illustration of the operation of the gross premium tax law of Oklahoma in question here, reveals that said laws are radically different in type and manner of application. The said Illinois law applies before admissions and is a license fee and the said Oklahoma law applies after admission and is a license tax.

(E) ***Analysis of opinion of the Circuit Court of Appeals.***

(See analysis in Argument.)

a. The opinion makes no mention of the provisions of Sec. 18 of the General Insurance Act of 1909

(see Appendix I) which prescribes the conditions of admission of foreign companies in Oklahoma.

b. The opinion holds that the gross premium tax law of Oklahoma applies after admission and as a condition precedent in the event of a renewal of the annual license.

c. The opinion does not discuss the terms and provisions of the 1919 gross premium tax law of Illinois and makes no comparison of that law with the gross premium tax law of Oklahoma in question here. The court was obviously misled in its consideration of the Hanover case by the said 1919 law of Illinois that was incidentally involved but not questioned in the Hanover case.

III

The gross premium tax of Oklahoma imposes a discriminatory tax, and the constitutional necessity for equal protection of the laws cannot be avoided under the guise that payment of such tax is a condition precedent to the issuance of renewal licenses.

Hanover Fire Insurance Co. v. *Harding, supra:*

a. It is obviously the view of the Circuit Court of Appeals that the constitutional necessity for equal protection of the laws is avoided under the Oklahoma gross premium tax law here in question, by adopting the theory that failure to pay the tax that is exacted at the end of the annual license period, justifies a refusal to grant a renewal license for the ensuing license year.

Great Northern Life Insurance Co. v. *Read*, 136 Fed. (2d) 44.

(A) ***Discussion of cases cited by the Circuit Court of Appeals in support of its theory.***

(See analysis of those cases in Argument.)

a. The authorities relied upon by the Circuit Court of Appeals in support of the above mentioned theory were decided long prior to the decision in the Hanover case, and are predicated upon cases that either arose before the 14th Amendment to the Federal constitution became effective or did not involve the 14th Amendment.

(B) ***The theory adopted by the Circuit Court of Appeals is repugnant to the principles announced in the Hanover case.***

Hanover Fire Insurance Co. v. *Harding, supra*:

a. The case of *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, primarily relied upon by the Circuit Court of Appeals and the class of cases cited therein in support of the theory adopted by the Circuit Court of Appeals, were considered by this Court in 1910 in the case of *Southern Railway Co.* v. *Green*, 216 U. S. 400.

b. *Hanover Fire Insurance Co.* v. *Harding, supra*, was decided in 1926 and some 58 years after the 14th Amendment went into effect. In that case the defendant in error cited and relied upon *Fire Association of Philadelphia* v. *New York, supra*, and cases therein cited, but this Court observed that by later decisions the state was precluded from exacting as a condition of foreign corporations engaging in business within its limits, that the rights secured to such corporations by the Federal constitution might be infringed.

c. The gross premium tax law of Oklahoma offends the Federal constitution and cannot be justified as a condition precedent to renewals of licenses issued for only one year at a time.

Hanover Fire Insurance Co. v. *Harding, supra.*

Sneed v. *Shaffer Oil & Refining Co.* (C. C. A. 8th), 35 Fed. (2d) 21.

(C) ***Valid conditions precedent under Oklahoma law.***
(See analysis in Argument.)

a. The valid conditions precedent to admission into the state under the law of Oklahoma are the payment of the license fee in the definite sum prescribed by Sec. 2, Art. XIX of the Constitution and compliance with Secs. 11 and 18 of the General Insurance Act of 1909.
(See Appendix I.)

(D) ***The operation and effect of the gross premium tax law of Oklahoma precludes its recognition as a valid condition precedent to the issuance of renewal licenses.***

Hanover Fire Insurance Company v. *Harding, supra*:

a. The Oklahoma gross premium tax law in question applies after the issuance of the license to the foreign insurance corporation, whether the license is an original or a renewal license, according to its own terms, (see Appendix II), Sec. 2, Art. XIX of the Constitution of Oklahoma, the General Insurance Act of 1909 (Appendix I), the uniform administrative practice in Oklahoma and the decision of the Circuit Court of Appeals.

b. The Oklahoma gross premium tax law in question cannot constitute a valid condition precedent to

the renewal of annual licenses, for the reason that it violates the 14th Amendment to the Federal Constitution.

Hanover Fire Insurance Company v. *Harding, supra.*

IV

The 4% gross premium tax of Oklahoma and the unconstitutional net receipts tax in question in the Hanover case are identical in character and method of application.

(See analysis in Argument.)

V

The gross premium tax laws of other states afford no authority in the determination of the question in this case.

CONCLUSION

a. The guaranties of the Federal Constitution should not be permitted to be avoided through disguise and manipulation.

Marion L. Frost, et al. v. *Railroad Commission of the State of California, supra.*

b. If the State of Oklahoma can at will deprive foreign insurance corporations of the equal protection of the laws, then it in effect nullifies the Constitution of the United States.

Doyle v. *Continental Insurance Co.*, 94 U. S. 535.

ARGUMENT

The legal effect of the law in question and the uniform administrative practice thereunder, in the light of the requirements of the Fourteenth Amendment to the Federal Constitution, is the primary question here for determination.

We shall hereinafter subject the tax law in question to the test prescribed by the decisions of this Court and demonstrate that the decision of the Circuit Court of Appeals erroneously fails to follow the rules prescribed. In so doing we shall demonstrate that the tax law in question violates the Federal Constitution.

I

The rules and principles announced by the United States Supreme Court in the Hanover case reveal that the tax law of Oklahoma here in question denies to foreign corporations in Oklahoma the equal protection of the laws.

The leading case on the questions here presented is *Hanover Fire Ins. Co. v. Harding* (*Hanover Fire Insurance Co. v. Carr*), 272 U. S. 494, 71 L. ed. 372, decided by this Court in 1926. It is thoroughly germane and in point. It is supported by numerous authorities of this Court which are therein cited. For convenience we shall refer to it as "the Hanover case." (All quotations herein from the Hanover case will be followed by the page number where that quotation appears in 272 U. S.) The decision of the Circuit Court of Appeals states that the Hanover case is dis-

tinguishable from the instant case. We contend that the Circuit Court of Appeals in so holding failed to regard the *substance* of the Oklahoma law and its *effect* as applied and enforced by the State; that said Court was misled by the *form* in which the taxing scheme is cast and its *character* as adopted by the Supreme Court of Oklahoma; that said Court did not in its opinion compare the terms and provisions of the 1919 gross premium tax law of Illinois incidentally involved in the Hanover case with the terms and provisions of the Oklahoma gross premium tax law in question here. Therefore we shall discard brevity in the consideration of the Hanover case.

(A) ***This Court will accept the character of the tax as determined by the State Court, but will exercise its independent judgment in determining whether the tax with the meaning given violated the Federal Constitution.***

The tax in question in the Hanover case was imposed by Section 30 of the Fire and Marine Insurance Act of 1869 (Cahill's Ill. Rev. Stat. 1925, Chap. 73, Sec. 159, p. 1405), against foreign fire, marine, and inland navigation insurance companies. Section 30 provided that the *net receipts* of such companies should be subject to the *same rate* of taxation that other personal property was subject to at the place where located. The rate of tax applicable to personal property was adopted as a basis for computing the tax imposed by Section 30. *People* v. *Kent*, (Ill.) 133 N. E. 276. There were in Illinois domestic insurance companies doing business in all of such risks, and they paid no tax on net receipts.

As shown by the Hanover case (pages 504-505), the laws of Illinois provided that the assessment of personal property was to be arrived at by taking one-half of the fair cash value of the property. The above decision further shows that by many years' custom in the State of Illinois, the fair cash value which was used in computing the assesed valuation was reduced to 60% prior to the computation of the assessed value, so that in practice the actual assessed value of personal property was only 30% of the fair cash value of the property.

The Supreme Court of Illinois for many years had held that the net receipts tax was a tax on personal property. In practice the net receipts had been treated as personal property, and their assessment was by equalization and debasement reduced from full value as all other personal property until 1921.

In 1921 the Supreme Court of Illinois in *People ex rel. Chicago* v. *Kent*, 133 N. E. 276, and in 1923 in *People ex rel. Chicago* v. *Barrett*, 139 N. E. 903, held that said net receipts tax is a tax on the business of insurance and not a personal property tax. The Hanover case, in dealing with those cases, referred to the tax as "an occupation tax."

The Supreme Court of Illinois in the Hanover case, 148 N. E. 23, in that regard said:

> "The tax provided by section 30 does not purport to be a property tax. * * * It is a tax on the amount of business done, and for the privilege of continuing in such business and the net receipts of such business are used as the basis in determining that tax. * * *. A

tax on business, as provided in this act, is not, as argued, to be distinguished from a privilege tax."

Whether the term used is "occupation tax," "business tax," "privilege tax," "license tax," or "franchise tax," it remains an excise charged for the privilege of doing business, and *all of such taxes are of the same essential character.* Witness "Cooley on Taxation":

"Taxes are either (1) capitation or poll taxes, (2) taxes on property, or (3) *excise taxes.* The first two are generally classified as direct taxes and the third as indirect taxes. Another classification is as (a) specific and (b) ad valorem." Cooley Taxation (4th ed.), Vol. 1, page 118.

"An *excise tax,* using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statutes or referred to as privilege taxes, license taxes, occupation taxes, and business taxes. There is no clear line of demarcation between so-called 'license,' 'occupation,' and 'privilege' taxes. In the case of corporations such taxes are often referred to as franchise taxes.

"Sometimes the term '*license fee*' is used to distinguish an exercise of the police power from an exercise of the taxing power referred to as a 'license tax.'" Cooley Taxation (4th ed.), Vol. 1, pages 129-131.

As indicated above, only the "license fee" is distinguishable from the various excises. Whether the exaction is a valid excise tax, as distinguished from a valid license or admission fee, involves the inquiry regarding the oper-

ation and effect of the tax law. That is the question concerning the nature of the tax which is material in testing whether such tax violates the Fourteenth Amendment to the Federal Constitution.

The assessment of net receipts for the year 1922, involved in the Hanover case, was on the basis of 100% of the net receipts. Therefore, at the time the Hanover case was decided by the United States Supreme Court, the said net receipts tax had definitely been characterized by the Supreme Court of Illinois as a business or occupation tax. In that regard this Court said:

> "The situation then is that a foreign fire, marine and inland navigation insurance company like the petioner must pay at a rate per centum equivalent to that imposed on personal property a tax on the cash amount or 100 per cent of its net receipts from all its insurance business. * * * (p. 506).
>
> "It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis, Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, at page 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the 14th Amendment:
>
> " 'Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax

imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and *the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.*' (pp. 509-510).

"While we may not question the meaning of the tax law as interpreted by the state court in the manner and effect in which it is to be enforced, we must reexamine the question passed upon by the state court as to whether the law complained of is a part of the condition upon which admission to do business of the state is permitted and is merely a regulating license by the state to protect the state and its citizens in dealing with such corporation, or whether it is a tax law for the purpose fo securing contributions to the revenue of the state as they are made by other taxpayers of the state" (pp. 510-511).

The Court also referred to one of its former decisions wherein it was said:

"'The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. *But this Court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect*'" (p. 510).

Then the Court, in passing upon the discriminatory nature of the tax, said:

"Under the previous decisions of the Supreme Court

of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, * * *. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws" (pp. 516-517).

The above quotations from the Hanover case clearly reveal: Section 30 had been characterized by the Supreme Court of Illinois first as a property tax and finally as an occupation or privilege tax. The provisions of the law at all times remained the same. The United States Supreme Court was bound to accept the law as imposing a privilege or occupation tax since that was its character at the time, according to the Supreme Court of Illinois. However, its validity either as a property or privilege tax depended upon its effect as applied and enforced. When the law was held to impose a privilege tax as distinguished from a property tax under former decisions, the result that followed was an increase in the *rate of the tax* and the exactions from foreign insurance companies thereunder to such a point as to constitute a heavy discrimination in favor of domestic insurance companies.

(B) ***The question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations.***

The Hanover case (pp. 502-503) reveals that the said act of 1869 of the State of Illinois (of which Section 30 there in question was a part), before admitting foreign insurance companies into the state, required that such companies have a prescribed amount of capital; appoint a service agent in the state; file a copy of its charter and a statement of its financial condition and last annual report; and deposit certain securities within the state. It further required annual certificates or licenses to transact business and subjected any one violating the act to a penalty not exceeding $500.00. It required such companies to make annual reports of their condition and affairs and the Insurance Superintendent was given authority to investigate the affairs of such companies and, if unsound, to close up the business of the company.

The Hanover case further reveals (pp. 503-504) that Illinois in 1919 imposed upon foreign insurance companies a 2% gross premium tax and provided that said premium tax should not prohibit the collection of the net receipts tax authorized by Section 30 of the act of 1869. The same 1919 statute further provided for the suspension of such companies and the revocation of their licenses upon their failure or neglect to make any report or failure to pay any tax assessment within thirty days after the same became due. The 1919 insurance premium tax of Illinois clearly

operates as a *condition precedent* to admission into the State of Illinois (see Appendix III).

The text of the 1919 gross premium tax law of Illinois is not included in the opinion of the Court in the Hanover case. The operation and effect of that law was obviously understood by the Court and all counsel involved in the case, but an analysis of the opinion in the Hanover case without an understanding of the terms and provisions of the 1919 gross premium tax law of Illinois can very easily result in the error found in the decision of the Circuit Court of Appeals. Although the 1919 gross premium tax law of Illinois and the Oklahoma gross premium tax law here in question impose a tax measured upon gross premiums, they are radically different in operation and effect. The material portions of the Illinois law are quoted in Appendix III. Section 13 thereof shows that the law does not in fact measure the tax on gross premiums, for the first license year. We will hereinafter illustrate and compare the operation of both laws and demonstrate that the 1919 law of Illinois is a true *license fee* (condition precedent) exacted from foreign corporations *before admission* for the ensuing license year, while the Oklahoma law is a *privilege tax* exacted from foreign corporations *after admission* and for the license year ending at the time of payment.

The foreign insurance company involved in the Hanover case questioned the said net receipts tax under Section 30 but complied with the other requirements of the said act of 1869 and paid the 2% premium tax as provided by the act of 1919. It insisted that under the previous

practice and proper construction of Section 30 as a property tax with due equalization and debasement, the tax assessed upon its net receipts should have been $2,155.24, and that this, if anything, was all that should be collected from it. The Supreme Court of Illinois affirmed the decree of the Superior Court, which denied equalization and debasement of the net receipts as personal property, but corrected the amount of net receipts reported by the Board of Review and forbade the collection of a tax of more than $7,184.18.

The line of demarcation separating foreign corporations that are without the equal protection clause from those that come within it was graphically depicted by MR. CHIEF JUSTICE TAFT in the Hanover case, where it was said:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the *admission fee*, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequalities as between the foreign corporations and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment, *but after its admis-*

sion, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.

"In this class of cases, therefore, the question of *the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations* in engaging in business within the state. To leave the determination of such a question finally to a state court would be to deprive this court of its independent judgment in determining whether a Federal constitutional limitation has been infringed. * * *" (pp. 510-511).

(C) *A foreign insurance company is admitted into the State and put on a level with domestic insurance companies by compliance with valid CONDITIONS PRECEDENT.*

The Hanover case then proceeded to show when the foreign insurance company in that case was received into the State of Illinois and put on a level with all other insurance companies of the same kind. That question was considered in the following analysis by the Court:

"What, therefore, we have to decide here is * * * whether under the Law of 1919 the authority granted by the Department of Trade and Commerce for which the company paid 2% of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character. * * * (pp. 511-512). *By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the state* * * * (p. 515).

The Court properly considered the requirements of the 1919 2% gross insurance premium tax law of Illinois as conditions precedent to admission of foreign insurance companies into the State of Illinois. The text of that law was not quoted in the opinion. Its operation as a condition precedent to admission of foreign insurance companies into Illinois was obvious to all counsel involved in the case. The Court, in outlining the conditions precedent to admission into the State, made brief reference thereto. That phase of the Hanover case can easily result in a misunderstanding and improper application of the rules announced in the Hanover case when the gross insurance premium tax law of Oklahoma is subjected to the test prescribed by that case.

The Circuit Court of Appeals in its analysis of the Hanover case (R. 44-46) shows that at the time the Hanover case was decided the invalid tax under Section 30 (net receipts tax of Illinois) was an occupation tax, that the tax under the 1919 law of Illinois was a privilege tax; that the tax under the Oklahoma law in question is a privilege tax. The tax under the three laws just mentioned are excises and cannot be distinguished in the light of the equal protection clause of the Federal Constitution by the mere designation as "occupation" or "privilege" tax, as we have hereinabove shown under Proposition I (A). In subjecting such laws to the test of the equal protection clause, the distinction is to be found in the determination of whether the tax under the law, whatever is character may be, applies before or after the foreign insurance company receives its license to do business in the

State, as shown under Propositions I (C) and I (D) herein.

Although the decision of the Circuit Court of Appeals (R. 44-46) correctly reveals that the 1919 gross premium tax law of Illinois and the gross premium tax law of Oklahoma in question impose a tax for the privilege of doing business in the respective states, it makes no attempt whatever to compare the terms and provisions of these laws or to demonstrate how and when the tax under the two laws is exacted and paid in relation to the date of admission of foreign corporations into the State. The Circuit Court of Appeals apparently became satisfied that the effect of the tax law of Oklahoma in question was the same as the 1919 tax law of Illinois, when it found that the tax under both laws was measured upon gross premiums and was for the privilege of doing business in the respective states. But those are not the decisive factors, according to the Hanover case.

Analysis of the 1919 Gross Premium Tax Law of Illinois

The material provisions of the 1919 law of Illinois are shown in Appendix III. By Section 6 thereof the statutory license year commenced on the first day of July of each year, and ended on the 30th day of June next thereafter. By Section 13 thereof, a foreign insurance company applying for admission into Illinois for the first time, was required, *before admission*, to pay a sum made certain by the formula prescribed. It could not be measured by gross premiums and be paid *before* the company was

admitted for the first time. It was measured at the rate of $300.00 per annum for as many months as would elapse between the date of admission and the end of the statutory license year. Such payment was required for the license period commencing with the date of admission and ending at the expiration of the statutory license year. By Section 1 thereof, the annual 2% premium tax was measured on the gross amount of premiums received during the preceding calendar year. By Section 6 thereof said premium tax was due on the first day of July in each year, when the statutory license year commenced, and such payment was required for the statutory license year commencing on the first day of July in which it was due. Therefore, *before* a foreign company was first admitted into Illinois it paid a sum certain for the privilege of doing business during the fraction of the statutory license year *following* the issuance of the license. Before it renewed its license it was then for the first time required to pay a tax measured on premiums *previously* collected in the state, for the privilege of doing business during the statutory license year following the issuance of the renewal. In both instances the payment was exacted for the license period that followed the issuance of the license. The law did not measure the tax on business done *after* the issuance of the annual license, but required all payments exacted thereunder to be made *before* the issuance of the license. If the foreign corporation withdrew from Illinois at the end of any license year in which it was issued a license, it had previously paid for the privilege enjoyed and owed no tax under that law. The exaction under the 1919 law

of Illinois is technically a "license fee" or "admission fee", as distinguished from a "license tax." That distinction is very material in determining whether a tax law violates the Federal Constitution. The license or admission fee is exacted and paid before the foreign company is admitted into the State and, as stated in the Hanover case, *supra*, any inequalities as between foreign and domestic companies in that regard do not come within the inhibitions of the Fourteenth Amendment. But we will show that a "license tax" is exacted, applied, and paid after a foreign corporation has been admitted into the State and must conform to the equal protection clause of the Federal Constitution.

The United States Supreme Court in the Hanover case further said:

> "The complainant insurance company complied with the requirements of section 22 and other unrepealed sections of the Act of 1869 and paid the 2 per cent tax on its premiums received as provided by the Act of 1919" (p. 504).

The requirements of Section 22 of the Act of 1869 referred to are hereinabove stated, as outlined in the opinion, and made it unlawful for a foreign insurance company to transact any business in the State of Illinois unless it had a prescribed amount of capital, appointed a service agent in the state, filed a copy of its charter, a statement of its financial condition, and a copy of its last annual report, and deposited certain securities with the State.

It is therefore made clear by the opinion that by a compliance with such conditions precedent (Sec. 22 and the 1919 law), foreign insurance companies were received into the State of Illinois and put on a level with all other insurance companies of the same kind.

The Court further said in relation to the net receipts tax law of Illinois:

> "It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, * * * "(p. 512).

and then quotes from the decision of the State Court as follows:

> "*The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the state*" (p. 512).

It was plain that compliance with Section 30 was not a condition precedent to permission to do business in Illinois, because it applied after the admission of foreign insurance companies into the State. The assessment and collection of the net receipts tax prescribed by said Section 30 followed the admission of foreign corporations into the State of Illinois and the enjoyment by them of the privilege of doing business therein. The amount of the tax required to be paid could not be determined or paid, according to the provisions of Section 30, until after the foreign corporation has been admitted into the State and had done business therein. In this regard, the Supreme

Court of Illinois said, as quoted by the United States Supreme Court:

> "*Compensation for that privilege should be based on the benefits actually derived from the business done* under such privilege and *such compensation must necessarily be assessed in some manner after the business is done* and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed" (p. 512).

It is obvious that both the Supreme Court of Illinois and the Supreme Court of the United States in the Hanover case properly conceived the elements involved in the requirements of the laws of Illinois constituting conditions precedent to entry into the State. They agreed on that question and their understanding in that regard is in accord with the general definition of the term "condition precedent."

> "At the common law, a condition is precedent when its *fulfillment* must precede the vesting of an estate or the accruing of a right. * * *" *Webster's New International Dictionary, Second Edition*, p. 556.

(D) ***Tax laws that apply to foreign corporations after they are admitted into the State must conform to the equal protection clause of the Fourteenth Amendment.***

This Court in the Hanover case, having concluded that the net receipts tax under Section 30 there in question applied to foreign insurance companies *after* their admission into the State of Illinois and therefore did not

constitute a condition precedent to admission, was obliged to determine whether the tax discriminated against such companies. Many facts are stated in the opinion to demonstrate the discriminatory nature of the tax, which are immaterial to the consideration of the instant case. In the instant case the stipulation of facts (R. 20) and the findings of the trial court clearly reveal that the tax here in question is a heavy discrimination against foreign insurance companies in Oklahoma. However, on that phase of the case the following quotations from the Hanover case are important:

"In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the state" (p. 511).

"* * * *the controlling test is to be found in the operation and effect of the law, as applied and enforced by the state*" (p. 510).

"By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and *tax laws made to apply after it has been so received into the state* are to be considered laws enacted for the purpose of raising revenue for the state and *must conform to the equal protection clause of the 14th Amendment*" (pp. 515-516).

(E) ***A foreign corporation licensed for one year at a time cannot be required to show past compliance with a tax law that violates the Federal Constitution, under the guise that the payment of the tax is a condition precedent to the renewal of its annual license.***

A means of circumventing the guaranties of the Federal Constitution would be employed in cases like the Hanover case and the one at bar, wherein the State issues licenses to foreign companies for only one year at a time, if the State were permitted to enforce under the guise of a condition precedent to the renewal of the license a discriminatory tax based on benefits actually derived from business done and which must necessarily be assessed in some manner after business is done. The State in so manipulating the tax would be making past compliance with a tax law which violates the Fourteenth Amendment a condition precedent to a renewal of the license. The guaranties of the Federal Constitution would thus be manipulated out of existence, as pointed out in the language of this Court in the case of *Marion L. Frost et al.* v. *Railroad Commission of the State of California*, 271 U. S. 583, (decided June 7, 1926, and cited in the Hanover case) where on pages 593-594 it was said:

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizens of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge

the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The Supreme Court of Illinois in its decision reviewed by this Court in the Hanover case erroneously held that the foreign insurance company involved was required to pay the net receipts tax in order to maintain and retain its right to do business in the State and to obtain a new license for the following years. This presents the questions: What requirements may the State validly impose upon a foreign corporation as *conditions subsequent* to its admission into the State: Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after it receives its license to do business in the State may be employed to debar it from continuing in business within the State: Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after its admission into the State may be employed as a condition precedent to a renewal of the annual license?

Those questions are involved in the following analysis by the Supreme Court of the United States in the Hanover case:

"What, therefore, we have to decide here is whether the application of Section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, * * *. It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, but its reasoning that the payment of the tax under the section is a condition to its doing business in Illinois which may vary at the will of the state, without regard to taxes on similar domestic corporations is shown by the following passages: '* * * However, the greatest financial benefit to such company flows from the continuation of the privilege to do business * * *'" (p. 512).

Further passages from the decision of the Illinois Supreme Court relating to the provisions of the law of 1869 were quoted by the United States Supreme Court, including the following:

"'It is evident, therefore, from the language of Section 22 quoted, that before appellant may continue in business in this state, its agent shall procure annually from the insurance superintendent of the state or his successor in law, a certificate showing that it has complied with the requirements of Section 30 with reference to this tax. Such certificate can not be lawfully issued without such showing. This act provides no other means of collecting such tax and no reference is made for its collection'" (p. 513).

In this regard the United States Supreme Court proceeded by saying:

"The general principle upon which the Supreme Court of Illinois holds the tax complained of herein

to be valid is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform in order to maintain and retain its right to do business in the state. It was settled in [*citing cases*] that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But *there is a very important qualification to this power of the state,* the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that *the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the constitution of the United States may be infringed. This is illustrated* in respect to the breach of the commerce clause of the Constitution by the cases of [*citing cases*]. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void [*citing cases*]; in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation within the state but also on its property without the state, in violation of the due process clause of the 14th Amendment [*citing cases*]; and finally, *in cases* of a class to which it is contended the present case belongs, *where a tax or license law operates to deny to the foreign corporation the equal protection of the laws*" [*citing cases*] (pp. 507-508).

Whether the rules announced applied to foreign cor-

porations licensed for an indefinite period or from year to year the Court said:

> "In the Greene case the license was indefinite. In this case it must be renewed from year to year, *but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens*" (p. 509).

Continuing its analysis of the decision of the Supreme Court of Illinois, the United States Supreme Court said:

> "The view of the Court seems to be that the constitutional necessity for equal application of the laws of the state to foreign and domestic corporations properly engaged in business is avoided if only the state provides that failure to comply with the laws during the period or at the end of the period for which the license runs justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. *We do not think the state may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi domestic citizen.* Of course at the end of the year for which the license has been granted, the State may in its discretion impose as condition precedent for a renewed license past compliance with its *valid* laws; but *that does not enable the state to make past compliance with Section 30 a condition precedent to a renewal of the license, if* as we find *that section violates the 14th Amendment*, for, as already said, *while a state may forbid a foreign corporation to do business* within its jurisdiction, or to continue, *it may not do so by imposing on a corporation a sacrifice of its constitutional rights.* * * * The state in dealing with foreign corporations may properly and without discrimina

tion as between them and domestic companies regulate the former by a provision that for a failure by them to comply with any *valid* law governing the conduct of their business in the state the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the state. It is a police regulation. But the power thus to revoke a license for breach of a law can only be validly exercised if the law be a constitutional one" (pp. 514-515).

II

The gross premium tax law of Oklahoma applies after issuance of each annual license. Since it is exacted for the privilege already exercised, its payment cannot be required as a valid condition precedent to the annual license renewal.

We shall show that the gross premium tax law of Oklahoma in question imposes a tax that in the light of the equal protection clause of the Federal Constitution is the same as the unconstitutional net receipts tax of Illinois in question in the Hanover case.

(A) *Provisions of Constitution and Statutes of Oklahoma affecting determination of issue herein.*

Section 1, Article XIX, of the Constitution of Oklahoma, provides:

"1. Foreign Insurance Companies—Conditions of Doing Business.

"No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity

for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

We have shown under our Proposition I (E) (*ante*) and the Hanover case reveals that the State cannot

"* * * thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi* domestic citizen * * *" (p. 514).

" * * * the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution o the United States may be infringed" (p. 507).

Therefore, said constitutional provision violates the Federal Constitution insofar as it requires a foreign insurance corporation, before it is admitted into the state, to agree to comply with tax laws that deny to it the equal protection of the laws.

Section 2, Article XIX, of the Constitution of Oklahoma provides:

"Entrance Fees—Annual Tax.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the State, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the State, an entrance fee as follows:

"Each foreign Life Insurance Company, per annum, two hundred dollars; each Foreign Fire Insurance Company, per annum, one hundred dollars; each Foreign Accident and Health Insurance Company, jointly, per annum, one hundred dollars; each Surety and Bond Company, per annum, one hundred and fifty dollars; each Plate Glass Insurance Company (not accident), per annum, twenty-five dollars; each foreign live stock insurance company, per annum, twenty-five dollars.

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

The first two paragraphs of Section 2, Article XIX, of the Constitution (*supra*) require foreign insurance companies to pay the entrance fees therein prescribed. The title "Entrance Fees" refers to those paragraphs. By the last paragraph of the section the premium tax is imposed and the title "Annual Tax" refers to that paragraph, which in context stands alone to the same extent as though it were embodied in a separate section. In grammatical construction it is in no manner dependent upon or related to the preceding two paragraphs dealing with the entrance fee. In fact, its requirements could not operate or apply until after the foreign insurance company had paid the entrance fee provided by the preceding paragraphs, received its license, and carried on its business. Insurance premiums against which the tax paragraph applies could

not conceivably be collected in the State until after the foreign insurance company had received its license to do business.

This observation corresponds with the statute of Oklahoma that originally imposed the 2% gross premium tax and the present statute that increased the rate to 4% (see Sec. 22, Appendix I, and Appendix II). Those statutes do not refer to the premium tax imposed by the Constitution as within the entrance fee paragraphs. Instead, the statutes require foreign corporations to "pay to the Insurance Commissioner an *entrance fee* as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of 2% (now 4%) on all premiums collected in this State."

In order to employ "premiums collected in the State" as a measure for an annual "entrance fee," "license fee," or "condition precedent" to admission instead of "an annual tax of 2% (now 4%) on all premiums collected in this State" as expressly stated in the Constitution and statutes, it would have been necessary to exempt foreign insurance companies from gross premium taxation upon their first year's business, as was done in the 1919 gross premium tax law of Illinois. It would have been necessary to admit them for one license year in order for them to do business and collect the premiums upon which to measure the entrance or license fee for the following year. In such event nothing would have been owing under the law by the foreign corporation if at the end of the first year it did not desire to renew its license and withdrew from the State. Such has never been the interpretation of the gross

premium tax laws of Oklahoma or the uniform administrative practice thereunder. (See quotation from opinion of Circuit Court of Appeals, *ante;* R. 40-41; stipulation of facts, R. 20-22.) The Legislature could not have so intended in the face of the express language employed in the statute. Had the Legislature so intended it would have been very simple to make provision therefor as did the 1919 gross premium tax law of Illinois (Appendix III).

In regard to how the tax applies in relation to when the foreign corporation is admitted, the Kansas Supreme Court has held in a recent decision (1940) in *Pacific Mut. Life Ins. Co. v. Hobbs,* 103 Pac. (2d) 854:

> "The statute requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes taxes, *payable at the end of the year,* for the privilege of doing business in the state. Gen. St. 1935, 40-252.
>
> "The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required *as a condition precedent to the renewal* of certificates of authority of such companies.' Gen. St. 1935, 40-252."

In the opinion the Court pointed out that otherwise:

> " * * * a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the

first year. It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business."

That case is important in the consideration of the present question only to the extent of showing that such taxes apply *after admission* and are paid *after* the privilege is exercised. The question whether the tax there considered violated the equal protection clause of the Federal Constitution was not involved in that case. In this regard the Supreme Court of Illinois said with reference to the net receipts tax in question in the Hanover case, as quoted in the opinion of the Hanover case at page 512:

> "*Compensation for that privilege should be based on the benefits actually derived from the business done* under such privilege and *such compensation must necessarily be assessed in some manner after the business is done* and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed."

The material sections of the Oklahoma General Insurance Act of 1909 are shown in Appendix I. The Oklahoma 4% gross premium tax law of 1941 here in question is shown as Appendix II. It may be observed therefrom that the tax law here in question originated as Section 22 of the General Insurance Act of 1909 (Appendix I). The terms and provisions of the original law have remained the same in all material respects, except that effective April 25, 1941, the rate of the tax was increased from 2% to 4%. In the Hanover case the increase in the rate of the

tax resulted from a decision of the Supreme Court characterizing the net receipts tax law there in question as a privilege tax (see Proposition I [A]).

Similar to the Act of 1869 of the State of Illinois, of which Section 30, the net receipts tax in question in the Hanover case, was a part, the Oklahoma General Insurance Act of 1909, of which the gross premium tax law in question here was a part, before admitting foreign insurance companies into Oklahoma, required by Section 11 that the Insurance Commissioner be satisfied that the company is qualified under the laws of the State to transact business. Section 18, entitled "Condition of Admission to do Business," provides:

> "No foreign insurance company shall be admitted and authorized to do business in this state until: * * *"

First: It files a copy of its charter and a statement of its financial condition.

Second: It shall satisfy the Insurance Commissioner that it is legally organized under the laws of its State to do the business it proposes to transact in Oklahoma. If a life insurance company, that it has on deposit with the proper officer securities in a prescribed amount and type.

Third: If other than a surety or bond company, it is required to have a paid-up capital or guaranty capital or surplus in a prescribed amount.

Fourth: It shall appoint the Insurance Commissioner its service agent.

Section 21 requires the Insurance Commissioner to

issue to foreign insurance companies a license or certificate of authority, if he finds that the facts warrant and that all laws applicable to said company are fully complied with.

Similar to the requirements of the Act of 1869 of the State of Illinois, set forth in the Hanover case (see Proposition I [B], the Oklahoma General Insurance Act of 1909 Appendix I) further requires by Section 21, annual certificates or licenses to foreign insurance companies, which expire on the last day of February in each year. It requires by Section 21 that such companies make annual reports of their condition and affairs. Section 13 gives the Insurance Commissioner authority to investigate the affairs of such companies and if unsound, Section 15 gives the Insurance Commissioner authority to revoke or suspend the license and close up the business. Section 26 subjects any one violating the Act to a penalty not exceeding $500.00.

(B) *Oklahoma decision construing the Oklahoma gross premium tax law.*

(The New York Life Insurance Company Case)

The case of *New York Life Ins. Co. v. Board of Co. Com'rs*, 155 Okla. 247, 9 Pac. (2d) 936, involved the question of whether or not the payment of the gross premium tax under the tax law here in question was in lieu of ad valorem taxes on the foreign insurance company's property. The Court in the opinion recited the provisions of Sections 1 and 2, Article XIX, of the Constitution hereinabove quoted, and the provisions of the tax law here in question (Appendix II), and said:

"'A tax on gross premiums of insurance is a tax upon the receipts of money or its representative in notes and bills, and not on property or any article of commerce; it touches only a fund in the treasury of the company. * * * *A tax law imposing a percentage on premiums of a foreign insurance company is a tax on the business.* * * *.'

* * * * * * * *

"* * * It seems manifest that a certain per cent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee or privilege tax should be charged to said corporation for the right or privilege to do business within the state. * * * The state has the power to impose these conditions, which are subject to no constitutional limitation or inhibition, *except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution.*"

The Oklahoma Court therefore characterized the tax law in question as a tax "on the business" "for the right or privilege to do business within the State," which is the same character as was placed on the invalid net receipts tax of Illinois in question in the Hanover case. However, as we have shown under Proposition 1 (A) (*ante*), the question whether the tax, whatever its character may be, violates the Federal Constitution depends upon its effect as applied and enforced.

The Oklahoma Court recognized the principles announced in the Hanover case, as appears from the language "such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with

the Federal Constitution." However, the Court did not decide the question whether the gross premium tax violated the Federal Constitution, as that question was not involved.

Furthermore, the 2% insurance premium tax law was in force at the time that case was decided. Had the question been presented in that case as to whether the 2% tax violated the equal protection clause of the Federal Constitution and had the Court decided that it did not, it would not follow that the 4% tax here in question is valid. Whether foreign and domestic insurance corporations share fairly equivalent tax burdens is the question that must be determined in any case where the tax questioned applies *after admission* of the foreign corporation into the State. The rate of the tax at the time of such determination is a vital element.

(C) *Illustration of uniform administrative practice and construction in Oklahoma according to findings of Circuit Court of Appeals.*

The findings of the Circuit Court of Appeals regarding the uniform administrative practice of the Insurance Commissioner (R. 40-41) correctly establish such practice. Such practice is consistent with the requirements of the pertinent constitutional provisions (*ante*) and the statutory requirements of Oklahoma (Appendices I and II).

In order to clearly illustrate the uniform administrative practice in Oklahoma and demonstrate how the tax law in question operates we shall quote the findings of

said Court at pages 40 and 41 of the record and parenthetically apply the same to specific years, to-wit:

"It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma (Appendix I), when a foreign insurance company desires for the first time to do business in Oklahoma (commencing on the first day of August, 1942, for illustration), to require it, among other things, to file an application for a license to expire on the last day of February next after its issue (the 28th day of February, 1943, would be the expiration date of the license under above illustration), and, on or before such date (the 28th day of February, 1943), to pay the gross premium tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of issue of its license (the first day of August, 1942,) to and including the 31st day of December next (the 31st day of December, 1942); and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944), to require it, among other things, (a) to file, on or before the last day of February of the current license year (the 28th day of February, 1943), an application for a license for the ensuing year (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944, inclusive), (b) to pay the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year (calendar year ending the 31st day of December, 1942), as a *condition precedent to the issuance of the license for the ensuing year* (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944), and (c) to pay,

on or before the last day of February of the ensuing license year (the 29th day of February, 1944), the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year (calendar year ending the 31st day of December, 1943);"

The opinion then proceeds (R. 41) to correctly show that the Insurance Commissioner

"* * * *in issuing renewal licenses* has uniformly construed it (the tax law in question) as requiring the payment, on or before the last day of February in each year, of the gross premiums tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date."

That construction shows that if a renewal license is issued for the license year commencing March 1st, 1943, then on or before the 29th day of February, 1944, when such renewal license expires, the licensee is required to pay the tax for the right or privilege of having entered Oklahoma on the first day of March, 1943, and doing business therein during the license year expiring on the 29th day of February, 1944. This is borne out by the conclusion of the Court on page 46 of the record.

(D) *Illustration of operation of the 1919 Illinois gross premium tax law involved in the Hanover case.*

Reference is made to our discussion under Propositions I (B) and (C), *ante*, regarding the distinction between the 1919 Illinois gross premium tax law and the Oklahoma gross premium tax law in question. Supple-

menting that discussion and our illustration of the operation of the Oklahoma law, we feel that an illustration of the operation of the Illinois law will assist the Court in making the comparison. The material portions of the Illinois law are shown in Appendix III.

Under said Illinois law licenses to foreign insurance companies were issued for one year at a time. The license year commenced on the first day of July and expired on the 30th day of June next thereafter (Sec. 6).

Applying the provisions of said law to specific years to illustrate and show that it applies as a condition precedent to the issuance of the license each year, we find:

(a) Assume for the purpose of illustration that a foreign insurance company was admitted to do business in Illinois for the first time on August 1, 1921. *Before* it received its license and was admitted to do business in Illinois it was required to pay $275.00 (figured at the rate of $300.00 per annum for the number of months elapsing between August 1, 1921, and July 1, 1922—see Sec. 13). It was required to pay said tax *before* it was so admitted, and for the privilege of doing an insurance business in Illinois during the period following such payment and beginning August 1, 1921, the date of admission to do business in Illinois, and ending June 30, 1922, thereafter (see Sec. 6).

(b) Assume for the purpose of illustration that it desired to renew its license. *Before* it received a renewal of its license for the ensuing license year commencing on July 1, 1922 (Secs. 6 and 9), it was required to pay a tax

of 2% on the gross amount of premiums which it has received in Illinois during the calendar year 1921 (Sec. 1). It was required to pay said tax for the privilege of doing an insurance business in Illinois during the period following such payment, being the next ensuing license year beginning July 1, 1922 (Secs. 6 and 9).

(c) If at the end of the license year under either illustration (a) or (b), it did not desire to renew its license and be readmitted to do business in Illinois for the next ensuing license year, it owed no tax under the 1919 law for the privilege that it had enjoyed of doing business in Illinois, for it had paid for that privilege before it received its license to do business.

The 1919 Insurance Premium Tax Law of Illinois and the 1941 Insurance Premium Tax Law of Oklahoma Distinguished

It should readily be observed that *the 1919 insurance premium tax law of Illinois and the 4% insurance premium tax law of Oklahoma are radically different in type, character, and manner of application.* The Oklahoma 4% insurance premium tax law applies each year *after* the issuance of the license to the foreign insurance company. The determination and collection of the tax each year *follows* the issuance of the license. The determination and collection of the tax *follows* the enjoyment by the licensee of the privilege of doing business. The amount of the tax required to be paid cannot be determined or paid until *after* such companies do business in the State. When a foreign insurance company withdraws from the State of

Oklahoma at the end of its first license year or at the end of any current license year under a renewal license, it must nevertheless pay the tax that is determined and becomes due *at the end* of said current license year. It is plain, therefore, that said 4% tax on insurance premiums collected in the State of Oklahoma is not and cannot possibly be a *condition precedent* to the permission granted to foreign insurance companies to do business in Oklahoma.

The 1919 insurance premium tax law of Illinois applies *before* the admission of foreign insurance companies into the State of Illinois. The determination and collection of that tax precede each year the issuance of the license to the foreign insurance company and the enjoyment by it of the privilege for which the tax is paid. The tax must be paid *before* such company receives its license. The tax is paid for the *future and for the privilege to be enjoyed* during the license year following the payment thereof. When a foreign insurance company withdraws from the State of Illinois at the end of any current license year it owes no tax under said 1919 law, since it had before it received its license paid for the privilege enjoyed. It is plain, therefore, why said 1919 insurance premium tax law of Illinois was in the Hanover case treated and considered without question as a valid condition precedent to the admission of foreign insurance companies to do business in Illinois.

The 1919 insurance premium tax law of Illinois *applied and operated* as an entrance or license fee, *before admission.* Its arbitrary character was therefore immaterial. The 1941 insurance premium tax law of Oklahoma

applies and operates as an excise or business tax, *after admission.* Its arbitrary character is therefore very material.

(E) ***Analysis of opinion of the Circuit Court of Appeals.***

The opinion correctly shows that each certificate or license issued to petitioner for the years 1922 to 1942, inclusive, by its terms expired on the last day of February next after its issue (R. 39).

It correctly shows that under Section 1, Article XIX, of the Oklahoma Constitution, a foreign insurance company cannot be admitted into Oklahoma until it agrees to pay all taxes and fees at any time imposed by the State under penalty of forfeiture of its license (R. 39). But the Hanover case, as we have shown under our Propositions I(E) and II(A), *ante*, holds that a State cannot in that manner relieve itself from granting the equal protection of the laws; that the State cannot exact as a condition of the corporation's engaging in business within its limits that its rights secured by the Constitution of the United States may be infringed. Therefore, that provision of the Oklahoma Constitution does not validate the gross premium tax law in question, which imposes a discriminatory tax applying to business done after the foreign insurance corporation has received its license and which is paid after the privilege granted by such license has been enjoyed.

It correctly shows that under Section 2, Article XIX, of the Oklahoma Constitution foreign life insurance companies are required to pay an annual entrance fee of

$200.00 and an annual percentage tax on premiums collected in the State until otherwise provided by law (R. 39).

It correctly shows that the tax of 2% on all premiums collected in the State imposed by Section 22 of the Oklahoma General Insurance Act of 1909 was carried forward in Section 10478, Okla. Stat. 1931; that the 1941 amendment of that statute become effective April 25, 1941, and increased the rate of the tax from 2% to 4% (R. 40). This is revealed by Section 22 of Appendix I and Appendix II hereto attached.

It correctly reveals that Section 21 of the General Insurance Act of 1909 is carried forward in the present statutes of Oklahoma, and requires insurance companies to file on or before the last day of February in each year a statement of their financial condition and business of the preceding calendar year, and provides that the Insurance Commissioner shall issue licenses expiring on the last day of February next after their issuance to such companies that have complied with the laws of Oklahoma (R. 40). That section is shown as Section 21 in Appendix I hereto attached.

The opinion does not recite the provisions of Section 18 of the General Insurance Act of 1909, which outlines the conditions of admission to do business in Oklahoma. That section is also carried forward in the present statutes of Oklahoma. It is shown as Section 18 in Appendix I hereto attached, and we have hereinabove outlined its provisions under subdivision (A) of our Proposition II.

It correctly reveals the uniform administrative practice and construction in Oklahoma (R. 40-41). We have hereinabove under subsection (C) of our Proposition II quoted and illustrated the Court's findings in that regard.

The opinion correctly shows (R. 42): "It is not an essential of a privilege tax that it be paid before the exercise of the privilege." We readily admit that the law in question imposes a privilege tax and that the State may require it to be paid after the privilege is exercised, provided that it does not discriminate against foreign insurance companies in favor of similar domestic companies. We have shown under our Proposition I (A) that when the question presented is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the form or character of the tax, whether it be a privilege, occupation, excise, or property tax, is immaterial. But that according to the Hanover case "the controlling test is to be found in the operation and effect of the law as applied and enforced by the State" and "the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the State." Although privilege taxes may be required to be paid before or after the privilege is enjoyed, the 4% privilege tax here in question is paid *after* the privilege is enjoyed. That fact is material here only in that it clearly shows that the law operates and applies after the license is issued to the foreign insurance corporation.

The opinion (R. 41) correctly holds that foreign insur-

ance companies in Oklahoma are licensed for one year at a time. But we have shown under subsection (E) of our Proposition I that whether the license is indefinite or must be renewed from year to year, "the principle is the same that pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens."

The holding (R. 41) that no gross premiums tax is exacted from domestic insurance companies in Oklahoma pertains to the discriminatory nature of the tax, about which there is no question.

The opinion (R. 43) cites the decision of the Supreme Court of Oklahoma which we have discussed under our Proposition II (B).

The opinion (R. 44-46) deals at some length with the Hanover case in an attempt to distinguish it from the instant case. It shows that the 1919—2% gross premium tax law of Illinois imposed a tax on non-resident insurance companies for the privilege of doing business in Illinois (R. 44); that the license for which the tax under said law was paid put foreign corporations upon a level with like domestic insurance companies (R. 46). It shows that the net receipts tax in question in th. Hanover case was not a condition precedent to permission to do business in Illinois and, being a heavy discrimination in favor of domestic companies, violated the Federal Constitution. The opinion concludes the discussion of the Hanover case in these words:

"In that case, the State, having exacted a gross

premiums tax for the privilege of doing business in the State, undertook to impose, in addition thereto, an unconstitutional tax" (R. 46).

It is obvious that the Circuit Court of Appeals was misled in its consideration of the Hanover case by the 1919 law of Illinois incidentally involved in that case. It observed that the 1919 law of Illinois was a gross premiums tax law imposing a tax for the privilege of doing business in the State, and that its validity as a condition precedent to admission was not questioned in the Hanover case. However, the Circuit Court of Appeals failed to regard the substance of the 1919 Illinois law and its effect as applied by the State of Illinois. The Court does not discuss the terms of that law or in any manner compare its operation with the Oklahoma gross premium tax law in question. The 1919 gross premiums tax law of Illinois was not in question in the Hanover case and its terms were not set forth in the opinion. It was properly considered as a condition precedent to admission and the opinion in that case makes only a brief reference thereto. The Oklahoma gross premium tax law in question here and the 1919 Illinois gross premium tax law incidentally involved in the Hanover case are radically different in operation and effect, as shown under our Propositions I(B) and (C) and II (E).

We quote from the opinion (R. 43-44):

"The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941, to February 28, 1942, constituted a new license

year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year."

The authorities followed by the Circuit Court of Appeals on this phase of its opinion will be considered under our Proposition III.

Then the opinion concludes by holding (R. 46):

> "In the instant case, the state exacts the payment on or before the twenty-eighth day of February in each year (in leap years the 29th day of February) of a valid privilege tax based on gross premiums for the privilege of doing business in Oklahoma during the license year expiring on that date and the payment of such valid tax as a condition precedent to the issuance of a license for the ensuing license year. The Supreme Court recognized in the Hanover Insurance Company Case that 'at the end of the year for which the license has been granted, the State may in its discretion impose, as conditions precedent for a renewed license, past compliance with its *valid* laws.' "

The increase in the rate of the tax from 2% to 4% became effective April 25, 1941, and according to the first paragraph above quoted from the decision of the Circuit Court of Appeals, the petitioner was not entitled to a license for the license year beginning March 1, 1942, without paying the 4% tax for that year. But the 4% tax in

question is not in fact paid before admission and for the future. That is borne out by the concluding portion of the decision above quoted, which may be illustrated as follows:

The payment of the 4% tax on or before the 28th day of February, 1942, was exacted for the privilege of doing business during the license year expiring on the 28th day of February, 1942, and as a condition precedent to the issuance of a license for the license year beginning March 1, 1942. By paying said 4% tax on or before February 28, 1942, the petitioner was entitled to receive a license for the license year beginning March 1, 1942, and expiring February 28, 1943. Then the State exacts the payment on or before the 28th day of February, 1943, of the 4% tax for the privilege of doing business in Oklahoma during the license year expiring on that date, *viz*: The 28th day of February, 1943, and the payment of such tax as a condition precedent to the issuance of a license for the license year beginning March 1, 1943. If petitioner did not desire to do business in the State for the license year beginning March 1, 1943, and withdrew from the State on February 28, 1943, when its license expired, it would nevertheless be required to pay the tax for the privilege that it had enjoyed during the license year expiring at the time of its withdrawal.

The decision clearly and correctly shows that the 4% tax is exacted at the end of the license year for the privilege previously enjoyed. Such being the case the exaction is invalid either as a tax or as a condition precedent in the event of a renewal of the license for the ensuing year.

III

The gross premium tax of Oklahoma imposes a discriminatory tax, and the constitutional necessity for equal protection of the laws cannot be avoided under the guise that payment of such tax is a condition precedent to the issuance of renewal licenses.

The gross premium tax law of Oklahoma in question possesses the same character and constitutional defects as the invalid net receipts tax law of Illinois in question in the Hanover case.

The discriminatory nature of the Oklahoma tax is obvious. The Hanover case makes it clear that if the said discriminatory tax law applies *after* the foreign company is issued a license to do business in the State, such company could not be debarred from continuing, to do business in Oklahoma upon a failure or refusal to pay the tax, nor could a compliance with said tax law be required as a condition precedent to a renewal of the company's annual license.

Therefore, the decisive question in the instant case is whether the tax law in question, under its express terms and provisions, the uniform administrative practice and interpretation in Oklahoma, and the decision of the Circuit Court of Appeals constitutes one of the *valid* conditions precedent to the issuance of original or renewal licenses to foreign insurance companies.

Under our Proposition II (E) we have quoted the pertinent paragraphs from the decision of the Circuit Court

of Appeals. It is obviously the view of that Court that the constitutional necessity for equal protection of the laws is avoided under the Oklahoma gross premium tax law in question by following the theory that failure to pay the tax that is exacted at the end of the annual period for which the license runs justifies a refusal to grant a renewal license for the following license year. In support thereof the Court cites:

—*Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 119;

Manchester Fire Ins. Co. v. *Herriott*, C. C. Ia., 91 Fed. 711, 717-720;

British-American Mortg. Co. v. *Jones*, 77 S. C. 443, 58 S. E. 417, 420 (R. 44).

That theory of dealing with tax laws applicable to foreign corporations that are licensed for one year at a time permits circumvention, manipulation, and disguise through which the guaranties of the Fourteenth Amendment are avoided. If it may be said that this Court in the Philadelphia Fire Association case adopted any such theory, it has refused to adhere thereto in later cases, as may be observed from its opinion in the Hanover case. We shall now discuss each of the cases cited by the Circuit Court of Appeals on this phase of its opinion and the effect of such cases in the light of later decisions of this Court.

(A) *Discussion of cases cited by the Circuit Court of Appeals in support of its theory.*

(The Philadelphia Fire Association Case)

The case of *Fire Association of Philadelphia* v. *New York* (1886), 119 U. S. 110, which was cited by the Circuit Court of Appeals (R. 44), involved a retaliatory law of New York. The law was enacted in 1865 and as amended in 1875 provided that whenever the laws of other states should require any payment of New York corporations for taxes, license fees, etc., greater than required from similar companies of other states by the laws of New York, then all companies of such states doing business in New York should pay to New York an equal amount for such taxes, license fees, etc.

Pennsylvania, by an act passed April 4, 1873, prohibited a foreign insurance company from doing business in Pennsylvania until it was granted a certificate of authority. It required such corporations that were authorized to transact business in Pennsylvania to report in January of each year the premiums received by such companies during the preceding calendar year and to pay a percentage tax thereon. It further provided:

> "* * * and *the Commissioner shall not have power to grant a renewal of the certificate* or said company or association *until the tax aforesaid is paid into the state treasury.*"

The defendant Pennsylvania insurance company received a certificate of authority to do business in New York

in 1872 and from year to year thereafter until 1882. In the year 1881 the Pennsylvania company received in the State of New York premiums in an amount specified. The State of New York brought an action against the Pennsylvania company to recover the percentage tax on the premiums received by the Pennsylvania company during 1881. The State of New York contended that the Pennsylvania company should pay *as a tax* for the year 1881 the amount claimed. The Pennsylvania company claimed the benefit of the Fourteenth Amendment and contended that being in the State of New York by permission continuously from 1872 to 1882, the State of New York imposed on it while there in 1882 an unequal and unlawful burden. Neither contention was sustained. The Court in the opinion said:

> "This Pennsylvania Corporation came into the State of New York to do business, by the consent of the State, under this Act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. * * * It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the

new provisions; and *such consent could not be given until the tax, as a license fee for the future, should be paid.*"

The Fourteenth Amendment to the Constitution of the United States went into effect in July, 1868, only eighteen years before that case was decided. The Court relied primarily upon the earlier decisions in the cases of *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Ducat* v. *Chicago*, 10 Wall. 410, 19 L. ed. 972.

The case of *Paul* v. *Virginia* was decided November 1, 1869, approximately sixteen months after the Fourteenth Amendment became effective. *Ducat* v. *Chicago* was decided January 9, 1871, approximately two and one-half years after the Fourteenth Amendment became effective. *Paul* v. *Virginia* did not involve the Fourteenth Amendment, but involved the privilege and immunities clause of Section 2, Article IV, and the commerce clause of Section 8, Article I, of the Constitution. *Ducat* v. *Chicago*, as said in *Southern Ry. Co.* v. *Greene*, 216 U. S. 400:

> "* * * arose before the Fourteenth Amendment had become part of the Federal Constitution, and that no reference is made in the opinion of the court to the Fourteenth Amendment, although the case was decided after that amendment went into effect."

Mr. Justice Harlan filed a strong dissenting opinion in the Fire Association of Philadelphia case in which he discussed *Paul* v. *Virginia* and *Ducat* v. *Chicago* but pointed out that the right of the states to admit foreign corporations upon such terms and conditions as they may

think proper to impose is subject to the important qualification that was announced in the earlier case of *Lafayette Insurance Company* v. *French*, 18 How. 407, 15 L. ed. 453, *viz*: provided the terms and conditions so prescribed are not repugnant to the Constitution of the United States. That qualification, as pointed out in the dissenting opinion, had been applied in *Insurance Company* v. *Morse*, 20 Wall. 445, 22 L. ed. 365, to invalidate a statute of Wisconsin whereby foreign corporations before admission into the state were required to agree that suits brought against them in the state courts would not be removed to the Federal Courts. The dissenting opinion further pointed out that in the light of the guarantees of the Federal Constitution there existed no difference between the invalid Wisconsin statute involved in the *Insurance Company* v. *Morse* case and the New York statute involved in *Fire Association of Philadelphia* v. *New York*.

(The Manchester Fire Insurance Company Case)

The case of *Manchester Fire Ins. Co.* v. *Herriott* (1899), 91 Fed. 711 (Circuit Court, S. D. Iowa), which was cited by the Circuit Court of Appeals, was decided long before the decision in the Hanover case and follows *Paul* v. *Virginia* and *Ducat* v. *Chicago, supra*.

(British-American Mortgage Company Case)

The case of *British-American Mortgage Co.* v. *Jones* (1907), 77 S. C. 443, 58 S. E. 417 (Supreme Court of South

Carolina), which was cited by the Circuit Court of Appeals, was likewise decided long before the Hanover case and follows the Philadelphia Fire Association case.

(B) ***The theory adopted by the Circuit Court of Appeals is repugnant to the principles announced in the Hanover case.***

(The Greene Case)

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400 (1910), this Court held, quoting from the syllabus:

> "A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is a person within the jurisdiction of the state, and, as such, is protected by the equal protection of the laws clause of U. S. Const., 14th Amend., against the imposition, under 1 Ala. Code. 1907, secs. 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business."

In the opinion the Court discussed the case of *Ducat* v. *Chicago, supra,* and showed that it arose before the Fourteenth Amendment became effective. It also discussed and quoted from *Fire Association of Philadelphia* v. *New York, supra,* and then said:

> "We have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. It would not be frank to

say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

(The Hanover Case)

In 1926, and sixteen years after this Court had found that the Greene case was not governed by *Ducat* v. *Chicago, supra,* and *Fire Association of Philadelphia* v. *New York, supra,* it again was asked to apply those decisions in the Hanover case. The Hanover case was decided some 58 years after the Fourteenth Amendment went into effect, and the Court was mindful of the means employed to circumvent the guaranties for equal protection of the laws as to foreign corporations licensed for one year at a time.

The defendant in error in the Hanover case cited and relied upon *Paul* v. *Virginia, Ducat* v. *Chicago* and *Fire Association of Philadelphia* v. *New York* (see p. 375 of 71 L. ed.). The unanimous opinion in the Hanover case on page 507 of 272 U. S. expressly referred to *Paul* v. *Virginia* and *Ducat* v. *Chicago* among other cases to the same

effect. It pointed out that by later decisions there had been established an important qualification to the rule announced by the former decisions, in that the state may not exact as a condition of foreign corporations engaging in business within its limits, that the rights secured to such corporations by the constitution of the United States may be infringed. That qualification according to the opinion in the Hanover case had been applied to different classes of cases as described in the opinion and the Court then proceeded to apply it in the Hanover case where a tax or license law operated to deny to foreign corporations licensed for one year at a time the equal protection of the laws.

The opinion in the Hanover case on page 509 of 272 U. S. points out that in the Greene case the license was indefinite and in the Hanover case had to be renewed from year to year, but the principle is the same that during the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens. On page 514 of the opinion the Court, in discussing the decision of the Supreme Court of Illinois, points out that it seemed to be the view of that Court that the constitutional necessity for equal protection of the laws is avoided if the State provides that failure to comply with the law at the end of the period for which the license runs justifies a refusal to grant a new license for the following year. The Court then proceeds on pages 514 and 515 of the opinion to discuss and follow the principles announced in the Greene case and other cases cited, and to show that where foreign corporations are licensed for only one year

at a time a tax cannot be manipulated outside the guaranties of the Fourteenth Amendment by disguising the tax as a condition precedent to renewals of the annual license.

The practice of the Insurance Commissioner of Oklahoma, in requiring the payment of the gross premium tax in question, that becomes due at the end of each current license year, for the privilege exercised therein, as a condition precedent to the issuance of renewal licenses, is merely an attempt to avoid the constitutional necessity for equal protection of the laws. The attempt thus to avoid the constitutional guaranties of the Fourteenth Amendment is just as clear in the instant case as it was in the Hanover case. It was not permitted in the Hanover case and should not be permitted in the instant case.

(The Shaffer Oil & Refiining Company Case)

In *Sneed* v. *Shaffer Oil & Refg. Co.*, (C.C.A. 8th), 35 Fed. (2d) 21 (1929), the Court had under consideration the Oklahoma statute enacted in 1927, which imposed a license fee upon domestic corporations of 50c for each $1,000.00 or its authorized capital stock, or less, and a license fee upon foreign corporations of $1.00 for each $1,000.00 of its capital invested in its business in Oklahoma. The opinion points out that both domestic and foreign corporations were by Section 9947, Comp. Stat. of Okla. 1921, required to procure a license for one year at a time and pay the license fee prescribed, and that the Act of 1927 amended that statute only by prescribing the license fee above set forth; that Section 9952, Comp. Stat. of Okla. 1921, de-

fines the license year for which said tax is paid as commencing July 1st and expiring June 30th next thereafter. In holding that the tax there in question denied to foreign corporations the equal protection of the laws under the Fourteenth Amendment the Court quoted from the opinion in the Hanover case and the case of *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. Although the Shaffer Oil & Refining Company case involved a tax law that applied to foreign corporations licensed in Oklahoma for only one year at a time, it apparently was not considered by the Circuit Court of Appeals in deciding the instant case.

(C) ***Valid conditions precedent under Oklahoma law.***

Domestic insurance companies of Oklahoma, as well as foreign insurance companies admitted into Oklahoma, are required to file annual statements and to obtain annual licenses to do business as provided by Section 21 of the General Insurance Act of 1909 (Appendix I). Those regulations are not conditions of admission. Therefore the requirement that annual licenses be issued both to domestic and foreign insurance companies does not set the stage at which foreign corporations are put on a level with domestic insurance companies. That stage is set by the requirements of Sections 11 and 18 of the General Insurance Act of 1909 (Appendix I).

Applying the rules announced in the Hanover case, what are the *valid* conditions precedent to the admission of a foreign insurance company into the state of Oklahoma? Clearly, those valid, conditions precedent are the

requirements that apply and may be *fulfilled* prior to the admission of the foreign insurance company into the state, to-wit:

1. Payment of the entrance fee under Section 2, Article XIX, of the Constitution, viz: Foreign life insurance company, per annum, $200.00; foreign accident and health insurance company, per annum, $100.00. (Petitioner doing both kinds of business paid $300.00 per annum). It cannot be denied that this is a reasonable charge made annually under the regulatory powers of the State without regard to the period of admission. It is the "annual license fee."

2. Satisfy the Insurance Commissioner that the company is qualified to transact business as prescribed by Section 11 of the General Insurance Act of 1909 (Appendix I).

3. Compliance with the conditions of admission to do business in Oklahoma prescribed by Section 18 of the General Insurance Act of 1909 (Appendix I), which requires: (a) The filing of a copy of its charter and statement of its financial condition; (b) that it satisfy the Insurance Commissioner that it is legally organized under the laws of the foreign state; that it has on deposit with the prescribed officials certain designated securities; (c) that it have a paid-up capital or guaranty capital or surplus of the prescribed amount; and (d) that it appoint the Insurance Commissioner as its service agent.

Those are the requirements that constitute valid conditions precedent under the laws of Oklahoma and that

may be fulfilled before admission or issuance of renewal licenses, as defined in the Hanover case. When such requirements are complied with, the Insurance Commissioner is directed under Section 21 of the General Insurance Act of 1909 (Appendix I) to issue the license.

Those conditions precedent and certain other regulatory provisions imposed by the General Insurance Act of 1909, which we have discussed under our Proposition II (A), are of the same nature as those imposed by the State of Illinois and involved in the Hanover case, which we have discussed under our Proposition I (B). However arbitrary said requirements may be, it is within the discretion of the State to require their fulfillment before the foreign corporation is admitted to do business in the State. But as said in the Hanover case.

> "By compliance with the valid conditions precedent, the foreign company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and *tax laws made to apply after it has been so received into the state* are to be considered laws enacted for the purpose of raising revenue for the state and *must conform to the equal protection clause of the 14th Amendment*" (pp. 515-516).

(D) ***The operation and effect of the gross premium tax law of Oklahoma precludes its recognition as a valid condition precedent to the issuance of renewal licenses.***

According to the tax law in question, Section 2, Article XIX, of the Constitution of Oklahoma, the General Insurance Act of 1909, the uniform administrative practice and construction in Oklahoma, and the decision of the Circuit Court of Appeals in this case, it is clear that the tax law in question operates and applies after the issuance of the license to the foreign insurance corporation, whether the license is an original or a renewal license. Before the license is renewed for an ensuing license year, the licensee must show payment of the tax that becomes due at the expiration of the current license year as a condition precedent for the renewal license. If the company withdraws from the State at the end of any license year under either an original or a renewal license, it must pay the tax for the privilege that it had exercised and enjoyed under the license expiring at that time. It is a tax on premiums collected in the State, or on business done, and is due after the business has been done and applies as a tax for the privilege exercised before the payment. Its payment is also unlawfully employed as a license fee or condition precedent in the event of the issuance of a renewal license, but the tax is nevertheless still due and owing whether or not the licensee desires a renewal for the ensuing license year.

Since the tax law in question applies after the admission of the foreign insurance company into the State, and

after the issuance of each annual license, and imposes a tax that is a heavy discrimination in favor of similar domestic companies, it offends the equal protection clause of the Federal Constitution. And, as said in the Hanover case:

> "Tax laws made to apply *after* it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and *must conform to the equal protection clause of the 14th Amendment*" (p. 515).

If the tax imposed was not discriminatory, the State of course could employ the payment thereof as a valid condition precedent to the issuance of renewal licenses, but the Hanover case, as we have shown, holds that a State cannot make past compliance with a tax law that violates the Fourteenth Amendment a condition precedent to a renewal of the license.

IV

The 4% gross premium tax of Oklahoma and the unconstitutional net receipts tax in question in the Hanover case are identical in character and method of application.

The gross premium tax law of Oklahoma is in the same relative position as the unconstitutional and invalid net receipts tax law of Illinois in the Hanover case, for the reasons as follows:

(a) Said tax under the Oklahoma law is a privilege or occupation tax, as was the net receipt tax of Illinois

when it was before the United States Supreme Court in the Hanover case. (This observation is made to show the relative status of the two laws, although as shown above, the decision on the question of whether the tax violates the Fourteenth Amendment is not dependent upon the character of the tax.)

(b) The net receipts tax of Illinois was held in the Hanover case to be a heavy discrimination in favor of domestic insurance companies of the same class. It is obvious from the stipulation of facts and findings of the trial court that the gross premium tax of Oklahoma is a heavy discrimination in favor of domestic companies of the same class.

(c) A foreign insurance company doing business in Illinois was, as said in the Hanover case, required to renew its license from year to year. A foreign insurance company doing business in Oklahoma is required to renew its license from year to year.

(d) The said discriminatory Illinois net receipts tax law was held in the Hanover case to apply after the foreign insurance company there involved was admitted to do business in Illinois, and therefore to constitute neither a condition precedent to its admission to do business in Illinois nor a *valid* condition precedent to a renewal of its license in Illinois. Likewise, we have hereinabove shown that under the Constitution and statutes of Oklahoma, the administrative practice in Oklahoma, and the decisions of the court below, the said discriminatory gross premium tax law of Oklahoma *applies* after the foreign insurance company here involved was admitted to do business in Okla-

homa. Therefore, said tax cannot constitute either a condition precedent to do business in Oklahoma, or a *valid* condition precedent to a renewal of its license in Oklahoma.

(e) The foreign insurance company involved in the Hanover case was admitted to do business in Illinois and placed on a level with domestic companies of the same class by compliance with the *valid* conditions precedent hereinabove enumerated, including a compliance with the 1919 insurance premium tax law of Illinois, all of which were capable of fulfillment before said company was admitted to do business in Illinois. The tax under said 1919 law of Illinois constitutes the annual license fee in Illinois, and is in the same relative position as the annual $300.00 license fee paid by petitioner in Oklahoma. The foreign insurance company here was admitted to do business in Oklahoma and placed on a level with domestic companies of the same class by compliance with the valid conditions precedent hereinabove enumerated, including the payment of the said $300.00 license fee, all of which were capable of fulfillment before said company was admitted to do business in Oklahoma.

V

The gross premium tax laws of other states afford no authority in the determination of the question in this case.

Many states have imposed percentage taxes against premiums collected by foreign insurance companies. Those laws vary in many respects in operation and effect, and

in practically every state the rate of tax imposed is far less than the 4% rate applicable in Oklahoma. We agree with the statement in *New York Life Ins. Co.* v. *Board of Co. Com'rs*, on page 255, Volume 155 of Oklahoma Reports, 9 Pac. (2d) 936, to the effect that such is an equitable mode of determining what tax burdens should be charged to foreign insurance companies, *provided such taxes do not conflict with the Federal Constitution.*

The laws of some states apply the tax before admission of the foreign insurance corporation into the State, as was the case of the 1919 law of Illinois incidentally involved in the Hanover case. Other states, like Oklahoma, apply the tax after admission of the foreign insurance corporation into the State, as may be seen from the Kansas case of *Pacific Mutual Life Ins. Co.* v. *Hobbs* hereinabove cited. But whether the gross premium tax laws of the various States other than Oklahoma comply with the equal protection clause of the Federal Constitution cannot be determined from the face of such statutes, even though the statutes may apply the tax after admission. Many factors are involved in the determination of that question which cannot be ascertained from the statutes, and evidence would be necessary to determine the respective tax burdens shouldered by domestic and foreign insurance companies of the same class doing business in a given State. The fact that gross premium tax laws of various other States have not been questioned under the equal protection clause of the Federal Constitution is no criterion in the determination of that question regarding the Oklahoma law.